Supreme Court, U.S.
FILED
942002 JUN 7 1995
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

John D. Morris, *Petitioner,*

v.

Department of Revenue,
State of Oregon, *Respondent.*

On Petition for a Writ of Certiorari to the
Oregon Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JOHN ERIC WILKES
Counsel of Record
388 State Street, Suite 600
Salem, Oregon 97301
(503) 362-8402
Attorney for Petitioner

50pp

QUESTION PRESENTED

1. Whether the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying its citizens and the citizens of other states with an opportunity to appeal an erroneous tax assessment when they do not receive prior notice of the assessment within the prescribed period established by the State of Oregon for appealing tax assessment determinations.

2. Whether the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying individuals with an opportunity to appeal administrative agency determinations of residency for tax assessment purposes.

LIST OF PARTIES

Only those parties identified in the caption to this petition were parties in the Oregon Tax Court and Supreme Court of Oregon

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . . . 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. OREGON'S TAX ASSESSMENT NOTICE PROCEDURES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. 8

II. OREGON VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY NOT ALLOWING JUDICIAL DETERMINATIONS OF ADMINISTRATIVE RULINGS ON RESIDENCY ON WHICH TAX ASSESSMENTS ARE BASED. 12

TABLE OF CONTENTS - Continued

III. OREGON DOES NOT PROVIDE TAXPAYERS WITH AN OPPORTUNITY TO OBTAIN JUDICIAL REVIEWS OF TAX ASSESSMENTS 16

IV. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDY BEFORE SEEKING JUDICIAL REVIEW 17

CONCLUSION 18

APPENDIX 1a

A. OPINION OF SUPREME COURT OF OREGON VACATING JUDGMENT OF OREGON TAX COURT 1a

B. ORDER OF OREGON TAX COURT 12a

C. OPINION AND ORDER, OREGON DEPARTMENT OF REVENUE 16a

D. DRAFT OPINION AND ORDER OF HEARINGS OFFICER PFEFFERKORN 23a

TABLE OF AUTHORITIES

CASES

Harper v. Virginia Dept. of Taxation,
___ U.S. ___, 113, S.Ct 2510 (1993) 16

McKesson Corp. v. Div. Alcoholic Beverages,
496 U.S. 18, 110 S.Ct. 2238 (1990).....16

Morse v. IRS,
635 F.2d 701 (8th Cir 1980) 9

Phillips v. Commissioner,
283 U.S. 583 (1931) 9, 14

Reich v. Georgia,
1994 WL 675214 (1994) 16

Van Tran v. Dept. Of Rev.,
320 OR 170, 880 P2d 924 (1994), *cert den*
63 USLW 3625 (US 1995) 8, 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV, § 1 1

STATUTES AND RULES

ORS 305.265 .....1 , 5, 14

ORS 305.295 3

ORS 305.270 .....2, 14, 16, 17

TABLE OF AUTHORITIES - Continued

STATUTES AND RULES - CONTINUED

ORS 305.280 2

ORS 305.445 17

ORS 305.560 14

ORS 305.415(1)(b) 3

OAR 150-350.265(11) 10

John D. Morris respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. at 1a) is reported at _____ (1994). The opinion of the Oregon Tax Court (App. at 12a) is unpublished has been vacated. The administrative decision of the Oregon Department of Revenue is contained in Appendix B (App. at 12a).

JURISDICTION

The Supreme Court of Oregon entered its opinion on March 9, 1995. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statute 305.265 is entitled **Deficiency**

notices; payment of deficiency; assessment; administrative appeal; interest. That statutes provides in pertinent part:

> "(10) In the case of a failure to file a report or return on the date prescribed therefore, the department shall determine the tax according to the best of its information and belief, assess the tax plus appropriate penalty and interest, and give written notice of the determination and assessment to the person required to make the filing. . . ."
>
> "(11) Mailing of notice to the person at the person's last-known address shall constitute the giving of notice as prescribed in this section. . ."
>
> "(14). . .Assessments and billings of taxes shall be final after the expiration of the appeal period specified in ORS 305.280, and payment of the tax shall not give any person extension of the period within which an appeal may be taken."

Oregon Revised Statute 305.280 is entitled **Time for filing appeal; alternate appeals procedures where permitted by ORS 305.515 to ORS 305.555**. That statute provides in pertinent part as follows:

> "(2) An appeal . . .from any notice of assessment or refund denial issued by the Department of Revenue. . . ., shall be filed within 90 days from the date of the notice. An appeal from a proposed adjustment under ORS 305.270 shall be filed within 90 days from the date the notice of adjustment is final."

Oregon Revised Statute 305.270 is entitled **Refund of excess tax paid; claim procedure**. That statutes provides in

pertinent parts as follows:

> "(1)* * * if the amount of tax shown as due on a report or return originally filed with the department * * * *or collected pursuant to ORS 305.620, or as corrected by the department is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415."
>
> "(2)* * * * The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes specified * * *."

ORS 314.415 (1)(b) provides in part that "No refund shall be allowed or made after three years from the time the return is filed, or two years from the time the tax or a portion thereof, was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, * * * *"

Oregon Revised Statute 305.295 is entitled **Cancellation of tax, penalty or interest**. That statute provides in pertinent part as follows:

> "(6) A taxpayer may appeal denial of a request for cancellation of assessment or refund to the director. The decision of the director is final and may not be

appealed.

STATEMENT OF THE CASE

It is the practice and procedure of the State of Oregon that all taxpayers, resident and nonresident, are prohibited from contesting an erroneous or illegal tax assessment unless an appeal is taken to the Director of the Oregon Department of Revenue within 90 days from the date of the original notice of assessment.

Taxpayers who do not receive the original notice because the notice is sent to a "last known address" that is no longer valid have no ability to later obtain a review of an erroneous or illegal assessment.

During the calendar year 1985, petitioner did not work in the State of Oregon or have any income from Oregon sources. Further, petitioner asserts that he was not a resident or citizen of the State of Oregon during 1985 as well as the years immediately prior and subsequent thereto. He worked and lived in the states of Washington and Montana during the year of 1985. He was in Oregon in 1985 for purposes of visiting a friend after getting a divorce and losing his job in the State of Idaho in late 1984. Also, he stayed at his friend's home while going through outpatient treatment at a Veterans Administration hospital. In April 1986, he filed a timely federal income tax return showing an Oregon address.

In late 1988, Oregon, through an agreement for exchange of

information with the Internal Revenue Service, learned that petitioner had filed a timely 1985 federal tax return using an Oregon address. Based on that information, Oregon determined that petitioner was required to file an Oregon income tax return in 1985 and had failed to do so. In July 1989, the Oregon Department of Revenue ("department") issued petitioner a notice of determination and assessment pursuant to ORS 305.265(10). The department mailed the notice to an address contained on what was then an old outdated IRS transcript showing the address petitioner used on his 1987 federal income tax return. At the time respondent mailed the notice of assessment, petitioner's current Arkansas address was available and on file with the Internal Revenue Service. The United States Post Office returned the notice of assessment to respondent with the notation "Attempted - Not Known". Respondent did not request a current transcript from the Internal Revenue Service in order to obtain the most current address on file. Petitioner did not learn of the tax assessment until 1990 when he attempted to obtain a loan and learned of the tax lien on his credit report. This was long after the expiration of the 90 day appeal period.

In April 1991, petitioner appealed the 1985 tax assessment to respondent. Respondent held that it would not disturb the final assessment because (1) petitioner had not appealed from the notice of determination and assessment within 90 days, as required by statute, and (2) petitioner was a resident of the State of Oregon in

1985.[1]

Petitioner filed a pro se complaint in the Oregon Tax Court to appeal respondent's determination. The Oregon Tax Court held that plaintiff was a resident during the year of 1985 and sustained the director's order and opinion. Petitioner then sought review in the Oregon Supreme Court. Petitioner argued that (1) he was not a resident of Oregon in 1985, (2) department did not mail the notice of assessment to his last known address because it failed to make an appropriate and reasonable inquiry, and (3) that the department violated his rights to due process by refusing to provide him with a meaningful opportunity to appeal the assessment and obtain a judicial review.

The Oregon Supreme Court held that respondent exercised reasonable diligence in determining petitioner's last known address and that the Oregon Tax Court lacked jurisdiction to review petitioner's claim on the merits because he did not exhaust his administrative remedy of appealing the notice of assessment within 90 days from its date. The Oregon Supreme Court then vacated the decision of the Tax Court and remanded the case with instructions

---

[1] Respondent's finding as written by the hearings officer who conducted the hearing and received testimony was that petitioner was not a resident of Oregon in 1985 (app. 24a). The holding was subsequently changed by a hearings officer who did not participate in the appeal.

to dismiss the proceeding.

REASONS FOR GRANTING THE PETITION

This petition presents questions of substantial public importance concerning the legality of states taxing nonresident individuals on income received in another state by declaring the individual to be a resident and then denying the individual a meaningful opportunity to obtain a judicial review of the agency determination. Further this petition concerns the issue of what notice is required to protect a citizen's right to due process when States make final assessments that are not subject to appeal or judicial review. Currently, twelve states[2] and the District of Columbia do not permit taxpayers to challenge a notice of assessment if an appeal is not filed within the prescribed period for appealing the initial assessment determination. The reason for the failure is of no consequence. Accordingly, taxpayers who receive the notice of assessment and ignore it are treated the same as taxpayers who do not receive it because they are in a coma, are seriously ill, have long before moved, are divorced with an uncooperative or unfriendly ex-spouse, or any other number of valid reasons.

---

[2]Arkansas, Hawaii, Idaho, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont & West Virginia.

I. OREGON'S TAX ASSESSMENT NOTICE PROCEDURES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The State of Oregon, like all states and the federal government, provides that notices of tax assessments are to be mailed to the taxpayer's last known address. However, unlike the federal government and the majority of other states, Oregon's tax assessments become final after 90 days from the date of the notice of assessment and are not subject to appeal or protest after that time frame passes. Thus, if an individual does not receive the notice of assessment for whatever reason, he or she can not appeal or contest the assessment within the department or judicially in the courts. This is true even if the department later acknowledges that the tax is incorrect. The individual still must pay the total amount of tax, penalty and interest assessed and has no right to claim a refund. *Van Tran v. Dept. Of Rev.*, 320 Or 170, 174, 880 P2d 924 (1994), *cert den* 63 USLW 3625 (US 1995).

Petitioner did not ignore the Notice of Determination and Assessment the department mailed to him. He, like many people, moved and his forwarding address expired before the department mailed the notice. Yet, solely because he did not receive the notice and therefore did not appeal the assessment within 90 days, Oregon prohibits him from challenging the correctness and legality of the assessment.

The Oregon Supreme Court held in its opinion that the department used reasonable diligence in obtaining petitioner's last known address. (App. at 8a). Petitioner disagrees and argues that what is reasonable depends on the availability of postdeprivation appeal opportunities. The United States Court of Appeals for the Eighth Circuit addressed the adequacy of a notice of assessment sent by certified mail to the taxpayer's last known address when the notice was never received and was later returned undelivered. *Morse v. IRS*, 635 F.2d 701 (8th Cir 1980). In *Morse*, the court held the notice to be adequate under the Constitution because the taxpayer was not without adequate remedy as he still had the opportunity to pay the amount assessed, file a claim for refund and, if the claim was denied, institute an action in the United States District Court. *Id.*, at 703. The *Morse* court looked to this Court for authority in the case of *Phillips v. Commissioner*, 283 U.S. 589, 596, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). Accordingly, petitioner asserts that where states like Oregon make assessments which can only be appealed within a limited time period measured from the notice of assessment, the adequacy of the notice address is vital to protect the due process rights of individuals subject to state asserted tax assessments.

The Oregon court stated that it believed that the department used reasonable diligence by requesting an address from the Internal Revenue Service and verifying the address with old records

of the Oregon Department of Motor Vehicles (app at 8a). Petitioner strongly disagrees and would argue to this Court that it should hold Oregon to a higher standard of reasonable diligence in establishing an individual's last known address than what it might require of states which allow for a postdeprivation appeal procedure. It is the Oregon legistature that has limited the appeal process so that receipt of the notice is mandatory in order for individuals to have an adequate opportunity to correct mistakes.

The Oregon Supreme Court recognized in its opinion in this case that it is the written policy of the department to get last-known address information from the IRS (app. at 6a). The policy as contained in OAR 150-305.265(11) specifically states that (1) Notices are required to be mailed to the last known address, (2) the department shall use the address on the most recently filed return as the last know address, and (3) when the department has received information that the last known address is incorrect or outdated; the department may use IRS information when the date of the IRS information is more recent than the department information. In petitioner's case, the department used an old outdated address it obtained from the IRS in 1988 to mail out its notice of assessment in July 1989. If it did not occur to department employees that the address used for the notice of assessment was incorrect or outdated when the notice was mailed, they certainly should have when the Post Office returned the notice marked "Attempted - Not Known".

It was that notice that started the appeal clock running. Petitioner argues that the department did not use reasonable diligence in determining his last-known address in July 1989 because it did not request his most current address information from the IRS for its assessment notice. The IRS information would have contained his Arkansas address as shown on his 1988 federal return filed in early 1989. Requesting the most current information would not only be reasonable but extremely important to protect citizens of other states, like petitioner, from having to pay taxes that they do not owe. Because the assessment becomes final after a short appeal period, it is vital to taxpayers that the department use greater care and diligence in determining the last-known addresses for its assessment notices. In fact, it may well be that because final assessments are not correctable, that actual notice is required to satisfy due process requirements. This is especially so when the year subject to assessment is several years old and the information on which the assessment is based is only that a person used an Oregon address on a federal tax return. It is important to understand that tax returns are not filed in the same year for which income is being reported. Accordingly, the address an individual uses on his tax return for tax year 1985 would relate more to his residency in 1986 than it would for 1985.

II. OREGON VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY NOT ALLOWING JUDICIAL DETERMINATIONS OF ADMINISTRATIVE RULINGS ON RESIDENCY ON WHICH TAX ASSESSMENTS ARE BASED.

In its opinion in this case, the Oregon Supreme Court held that once the Oregon Department of Revenue determines that an individual is a resident of Oregon for tax purposes, the individual has no right to have that decision subjected to a judicial determination unless an appeal is filed within 90 days of the notice of assessment. An act which was impossible in petitioner's case since it would have been clairvoyant of him to have filed an appeal of an assessment he did not know existed within that short time frame.

The Oregon Supreme Court construed the law in Oregon to be that the courts have no jurisdiction to review agency determinations of residency after the initial 90 day appeal period expired. (App at 11a). Department decisions based on questions of law and fact regarding residency issues are not reviewable by Oregon courts. Petitioner had no income in 1985 from Oregon sources. Accordingly, Oregon would only subject his out of state income in 1985 to taxation should he be an Oregon resident. As a nonresident or part-year resident, he would owe no Oregon taxes. For that reason, it may well be that a tax raising and collecting agency would not be disposed to providing an objective

determination of residency based on the law and facts if its determinations were not subject to subsequent judicial review. Petitioner asks this Court to take note that in his case the hearings officer that conducted the appeal conference wrote his opinion finding him *not* to be a resident of Oregon. (App. at 23a). That decision was later changed by another hearings officer who did not participate in the hearing or receive the testimony. (App. at 16a). This is hardly an objective and meaningful opportunity to obtain a review of whether or not he was legally a resident of Oregon for tax purposes. Petitioner argues that a judicial review is required to meet the requirements of due process. Taxation is unquestionably a taking of property by the government. It is entirely possible under the existing laws in Oregon for the government taxing agency in need of additional revenue to assess taxes against citizens of other states by declaring them to be residents of Oregon, if no judicial review had to be afforded. Petitioner believes that this is precisely what has happened in his case.

Petitioner's situation would not constitute a violation of his rights to due process if Oregon provided individuals with the same opportunities to file postdeprivation appeals as does the Internal Revenue Service and as the majority of other states - to pay the tax assessment and additions and then file a claim for refund. By allowing such administrative appeal procedures, the failure to receive notification of the assessment is not irreversible should the

tax be illegal, incorrect or exaggerated.

This Court considered the issue of alternative predeprivation and postdeprivation appeal procedures as they relate to violations of due process requirements under the Fourteenth Amendment to the Constitution of the United States in the case of *Phillips v. Commissioner*, 283 U.S. 583 (1931). Mr. Justice Brandeis writing for the court held that the summary collection procedure was constitutional because two alternative methods of eventual judicial review were available under the federal statute at issue. Id. at 589. Specifically, the Court recognized that the statute provided taxpayers with an opportunity to obtain a judicial review by either (1) appealing from the determination of the Commissioner, or (2) having not appealed the assessment, paying the tax and bringing an action against the United States. *Id.* at 589-90.

Like the federal statute in *Phillips*, the Oregon Revised Statues provide for two alternative methods to obtain eventual judicial review. However, Oregon does not allow taxpayers to use one without simultaneously using the other. ORS 305.265 provides taxpayers with the opportunity to appeal the notice of determination of assessment to the Oregon Department of Revenue at the onset. ORS 305.270 provides taxpayers with the opportunity to file claims for refund and to appeal denials of claims within the Oregon Department of Revenue. ORS 305.560 provides taxpayers with the opportunity to obtain a judicial review of any Order (with one

exception which does not apply in this case) of the Oregon Department of Revenue arising under ORS Chapter 305.

Respondent argues that the administrative remedy by which taxpayers may appeal the notice of assessment is sufficient to meet the requirements of due process. Petitioner disagrees for three reasons. First, the administrative process provides taxpayers with the opportunity to have a hearing before an Oregon Department of Revenue Hearings Officer prior to paying the tax. The determination of the Hearings Officer is not final and is subject to change by the Director of the Oregon Department of Revenue. Second, taxpayers may then appeal this determination to the Oregon Tax Court to obtain a judicial review of the assessment, but only after paying the tax or obtaining a hardship exception to the payment of the tax. Third, if taxpayers for any reason fail to appeal the assessment at the onset, they are prohibited from later paying the tax and filing a claim for refund and filing a complaint in the Oregon Tax Court. Respondent construes its refund claim statute to require taxpayers to pay the tax and file the claim during the same time period for filing an appeal of the notice of assessment. For reasons before stated this may not be possible or feasible. Thus, Oregon's refusal to provide its taxpayers with an alternative remedy to contest assessments and thereby provide them with an opportunity for a judicial determination of the legality and correctness of assessments imposed upon them cannot pass muster

under the Due Process Clause of the United States Constitution.

III. OREGON DOES NOT PROVIDE TAXPAYERS WITH OPPORTUNITY TO OBTAIN JUDICIAL REVIEW OF TAX DEFICIENCY ASSESSMENTS.

This Court, in questions involving the legality of state tax assessments under the Constitution of the United States, has consistently held that taxpayers must be provided with an opportunity to obtain a meaningful review of the legality of assessments. *Reich v. Georgia*, 1994 WL 675214 (1994); *Harper v. Virginia Department of Taxation*, ___ U.S. ____, 113 S.Ct. 2510 (1993); *McKesson Corp. v. Div. Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990).

In *Reich v. Georgia*, this Court held that what a state specifically may not do is "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare. . . that no such remedy exists." This is what Oregon is doing not only to its taxpayers, but unfortunately to the citizens of other states as well. ORS 305.270 specifically provides taxpayers with the opportunity to contest tax assessments, including those corrected by the Oregon Department of Revenue, by paying the taxes first and then filing a claim for refund. There is no limitation in the refund claim statute indicating that this remedy is not available to taxpayers who did not appeal from the notice of deficiency assessment. Accordingly, the practice of Oregon refusing to

provide its taxpayer's with the "clear and certain" remedy set fourth in ORS 305.270 cannot stand under this Court's decision in *Reich v. Georgia.*

IV. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDY BEFORE SEEKING JUDICIAL REVIEW.

Petitioner did not fail to exhaust his administrative remedies. He appealed the assessment when he learned of its existence. As stated above, the Oregon statutes provide two alternative methods for appealing a notice of assessment. While petitioner did not avail himself of the remedy of appealing the notice of assessment, he filed a proper and timely administrative claim for refund pursuant to ORS 305.445. If petitioner had paid the tax first and filed a claim for refund, the result would not have changed. It would have been an act that would have no meaning to the Oregon Supreme Court. Specifically, the Oregon court recently held that the payment of tax does not afford a taxpayer with any postdeprivation appeal procedure; even though ORS 305.270 provides for such a remedy. *Van Tran v. Dept. of Rev., supra.* Petitioner is not arguing that he is entitled to two opportunities to obtain a judicial review of the correctness of the assessment imposed upon him. Rather he argues that the Oregon statutes provide him with two alternative administrative remedies and a procedure to obtain a judicial review after exhausting the remedy selected. Further he argues that federal

due process requires that Oregon provide him with the alternative postdeprivation remedy to obtain a judicial review if he does not appeal the initial assessment determination because he did not receive notification.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted.

Respectfully submitted,

JOHN ERIC WILKES
Counsel of Record
388 State Street, Suite 600
Salem, Oregon 97301
(503) 362-8402

APPENDIX A

Filed: March 9, 1995

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN D. MORRIS,

Appellant,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

(OTC 3437; SC S40774)

In Banc

On appeal from the Oregon Tax Court.

Carl N. Byers, Judge.

Argued and submitted October 31, 1994.

John Eric Wilkes, of Callaghan & Wilkes, Salem, argued the cause and filed a reply brief for appellant. John D. Morris, appellant, filed the opening brief pro se.

Jerry Bronner, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was Theodore R. Kulongoski, Attorney General, Salem.

CARSON, C. J.

The decision of the Tax Court is vacated. The case is remanded to the Tax Court with instructions to dismiss the proceeding.

CARSON, C. J.

This case comes before us on direct appeal of a Tax Court judgment sustaining an assessment of personal income taxes, penalties, and interest by the Department of Revenue (the departments) against plaintiff for the 1985 tax year. Plaintiff argues that he was not an Oregon resident in 1985 and that, consequently, he is not required to pay Oregon income tax for that year. The department responds that plaintiff's argument was one that he first had to make before the director of the department, that he did not do so, and that the failure to do so forecloses plaintiff from making the argument now. For the reasons that follow, we agree with the department.

Plaintiff did not file an Oregon tax return for the 1985 tax year. He did, however, file a timely federal tax return for 1985, showing an Oregon address. The Internal Revenue Service (IRS) notified the department that plaintiff had filed a federal return with an Oregon address. In December 1988, and in January 1989, the department sent plaintiff letters informing him that the department had not received a 1985 tax return and asking him to file a return. In March 1989, the department sent plaintiff another letter demanding that he file a return within 30 days. Plaintiff did not respond to any of the letters. In July 1989, the department mailed

a Notice of Determination and assessment to plaintiff.[3] The envelope was returned to the department, marked "Attempted - Not Known." Plaintiff again did not respond to the department. All three letters and the notice of determination and assessment were sent to an address in St. Helens, Oregon, which was provided by the IRS and was confirmed by the department by checking the records of the Motor Vehicles Division (MVD).

In August 1990, plaintiff communicated with the department about the 1985 assessment, for the purpose of removing a tax lien arising from the unpaid assessment. In April 1991, plaintiff requested an appeal of the assessment before the director of the department. The director granted plaintiff a hearing but, after the hearing, concluded that he would not disturb the final assessment because plaintiff had not appealed from the notice of determination and assessment within 90 days, as required by statute. ORS 305.280(2)[4] ("An appeal * * * from any notice of assessment * * * shall be filed within 90 days from the date of the notice."). The

---

[3] This notice advised plaintiff that the department had assessed taxes, penalties, and interest against him for the 1985 tax year.

[4] The statutes in effect in 1989, the year in which the taxes were assessed, control this case. Because there have been no pertinent changes in the code since that time, we cite to the 1993 version of the statutes throughout this opinion.

director also determined that plaintiff was not entitled to relief under ORS 305.295,[5] because he was an Oregon resident in 1985, and the State of Oregon may tax all the income of its residents under the Oregon Constitution and federal law. See, e.g., Keller v. Dept. Of Rev., 319 Or 73, 78, 872 P2d 414 (1994) ("The state's taxing authority extends to all of the income earned by its residents, including income earned outside the state."). The director of the department dismissed the appeal and concluded that plaintiff owed $4,863.68 (plus accruing interest) in income taxes, penalties, and interest.

Plaintiff then filed a complaint in the Tax Court, arguing that he had not been an Oregon resident during the 1985 tax year and, therefore, that he was not subject to Oregon income taxation for that year. The Tax Court concluded that plaintiff had been an Oregon resident during the 1985 tax year and sustained the director's order and opinion.

---

[5] ORS 305.295(1) provides, in part:

"[T]he Department of Revenue may in its discretion, cancel any tax, penalty or interest for which an assessment has become final, if any of the following conditions exist:

"(a) The assessment is based upon an asserted tax deficiency calculated upon income that the state is expressly prohibited from taxing under the Oregon Constitution or the laws of the United States."

Plaintiff seeks direct review in this court, again arguing that he was not a resident of Oregon during the 1985 tax year and, thus, that he was not subject to personal income taxation for that year. In response, the department argues, among other things, that the Tax Court and this court do not have a basis upon which to address the merits of plaintiff's appeal because an assessment of income taxes by the department becomes final if it is not appealed to the director within 90 days and because plaintiff failed to pursue, and to exhaust, his administrative remedies in a timely manner.

Before we turn to the merits of plaintiff's argument, we must decide whether the Tax Court had a basis upon which to hear this appeal. ORS 305.275(4) provides, in part: "[N]o person shall appeal to the Oregon Tax Court * * * on any matter arising under the revenue and tax laws administered by the department unless the person first exhausts the administrative remedies provided before the department and the director." (Emphasis added.)

ORS 305.275(1) provides that any person aggrieved by an act of the department "may appeal to the Director of the Department of Revenue in the manner provided by this section." As stated above, ORS 305.280(2) requires that an appeal to the director of the department from a notice of determination and assessment "shall be filed within 90 days from the date of the notice."

In order to exhaust administrative remedies sufficient to satisfy ORS 305.275(4), a taxpayer must pursue the available

administrative remedies in a timely manner. See, e.g., Ebert v. Dept. of Rev., 307 Or 649, 652-53, 771 P2d 1018 (1989) (holding that Tax Court did not have a statutory basis upon which to hear a challenge of an assessment of income tax because plaintiff failed to challenge the assessment before the department within 90 days). ORS 305.265(11) provides that "[m]ailing of notice to the person at the person's last-known address shall constitute the giving of notice as prescribed in this section." Once notice is given, the 90-day appeal period begins to run. ORS 305.280(2). Plaintiff argues that, because the department did not send the notice of determination and assessment to his "last-known address," the department did not provide notice of determination and assessment as required by the statute and, therefore, that plaintiff was not untimely in challenging the assessment.

We disagree. Although this court heretofore has not interpreted the meaning of "last-known address," we conclude that the department satisfied its obligation to provide notice under ORS 305.265(11).[6] "Last-known address" ordinarily refers to the address provided on the last Oregon income tax return filed by the taxpayer. Cf. United States v. Zolla, 724 F2d 808, 810 (9th Cir), cert den 469

---

[6] In 1992, the department promulgated a rule that instructs the department how to determine a taxpayer's "last-known address." See OAR 150-305.265(11) (setting forth procedure for ascertaining a taxpayer's last-known address).

US 830 (1984) (under Internal Revenue Code, last-known address is the one on the most recent tax return unless taxpayer gives clear and concise notice of a change of address); Eshweiler v. U.S., 946 Fed 45, 48 (7th Cir 1991) (under Internal Revenue Code, last-known address is the one on the return being audited unless taxpayer gives "clear and concise" notification of a change).[7]

However, the "last-known address" changes if the department has actual notice that the taxpayer's address has changed. Once the department has such notice, it is required to use reasonable diligence in ascertaining the taxpayer's last-known address. Cf. Eshweiler v. U.S., supra, 946 F2d at 48 ("The IRS need only exercise reasonable diligence in attempting to discover the taxpayer's last known address.").

In this case, plaintiff's last Oregon tax return was filed in 1981. The department, on its own, determined that the address was too old to use as the last-known address. In October 1988, after the IRS notified the department that plaintiff had filed a return with an Oregon address, the department requested a "federal transcript," which provided the department with the information from plaintiff's 1987 federal tax return. Plaintiff's 1987 return showed a St. Helens address.

The department sent the three preliminary letters to that

---

[7] Federal tax law does not control the tax law of Oregon. We cite federal cases only when we find them persuasive.

address. The department received no notice that those letters were undeliverable at that address. In May 1989, the department obtained a MVD computer printout, which showed the same St. Helens address. Plaintiff had an obligation to notify the MVD of any change of address. See ORS 807.560 (it is a Class D infraction to fail to notify the MVD within 30 days of a change of address from the address noted on a driver license.).

Based on the foregoing information, the department concluded that the St. Helens address was the last-known address and, on July 12, 1989, sent the notice of determination and assessment to that address. As previously observed, that letter was returned, marked "Attempted - Not Known." Plaintiff argues that the department was obligated to continue looking for his new address at that point. We disagree. The last-known address is determined at the time when the notice of determination and assessment is sent. Cf. Armstrong v. CIR, 15 F3d 970, 975 (10th Cir 1994) ("We agree with the Fifth, Seventh, and Ninth Circuits, as well as the [United States] Tax Court, that the IRS's duty to exercise reasonable diligence in ascertaining a taxpayer's last known address extends only to the point in time when the deficiency notice is mailed.").

We conclude that the department exercised reasonable diligence in determining that the St. Helens address provided by the IRS and confirmed by the MVD was plaintiff's last-known address.

Thus, the department gave notice of the assessment, as required by ORS 305.265(11), on July 12, 1989. Accordingly, plaintiff was required to appeal the assessment to the director within 90 days from that date. Plaintiff did not appeal within the statutory required time. His appeal to the director was not timely under ORS 305.280(2).

Plaintiff argues, in the alternative, that his appeal was not an appeal of the assessment, but rather an appeal from a denial of a claim for a refund under ORS 305.270 (governing claims for refunds). ORS 314.415(1)(b) provides that "[n]o refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid." Plaintiff argues that he challenged the denial of a refund within the two years and, therefore, that he made a timely claim and exhausted his administrative remedies.

That argument is unpersuasive. As this court held in Van Tran v. Dept. Of Rev., 320 Or 170, 174, 880 P2d 924 (1994), cert den 63 USLW 3625 (US 1995), a taxpayer may not fail to appeal an assessment within the appointed time and then later seek a refund, arguing that the basis for the assessment was improper.[1] The

---

[1] In fact, plaintiff's argument in this case is even farther afield than the argument made by the taxpayer in Van Tran. In Van Tran, the taxpayer paid the money due pursuant to the assessment before claiming the refund. Van Tran v. Dept. of Rev., 320 Or 170, 174, 880 P2d 924 (1994), cert den 63

taxpayer is required to challenge the assessment within 90 days or the assessment becomes final. ORS 305.265(14) and 305.280(2). Plaintiff did not challenge the assessment within 90 days; therefore, he failed to exhaust his administrative remedies, and the Tax Court had no basis upon which to address the merits of plaintiff's appeal. ORS 305.275(4).

One further issue deserves mention. Plaintiff argued before the director of the department that the department did not have jurisdiction to tax him because he was not a resident of Oregon. The director treated that argument as an appeal of the department's denial of a request to cancel a tax pursuant to ORS 305.295(1). That statute provides, in part:

> "(1) Notwithstanding ORS 305.265(14), the Department of Revenue may in its discretion, cancel any tax, penalty or interest for which an assessment has become final, if any of the following conditions exist:
>
> "(a) The assessment is based upon an asserted tax deficiency calculated upon income that the state is

---

USLW 3625 (US 1995). In this case, plaintiff argues that, even though he did not pay any taxes pursuant to the assessment, he was granted a hardship exception under ORS 305.419(3) by the Tax Court that extends to an appeal of a denial of refund as well as to a challenge of an assessment. Based on that leap of logic, plaintiff claims that he may file for a tax refund before he pays any of the assessed taxes. We do not find that argument persuasive.

> expressly prohibited from taxing under the Oregon Constitution or the laws of the United States.
>
> "* * * * *
>
> "(6) A taxpayer may appeal denial of a request for cancellation of assessment or refund to the director. The decision of the director is final and may not be appealed."

The director considered plaintiff's argument that the department did not have jurisdiction to tax him and concluded that plaintiff was an Oregon resident, giving the department the authority to tax him. Plaintiff is not entitled to review of that decision either in the Tax Court or in this court. ORS 305.295(6).

Plaintiff is not excused from the requirement that he exhaust his administrative remedies, nor did he exhaust those remedies; therefore, under Oregon statutory law, the Tax Court had no basis upon which to address plaintiff's claim on the merits.

The decision of the Tax Court is vacated. The case is remanded to the Tax Court with instructions to dismiss the proceeding.

APPENDIX B

IN THE OREGON TAX COURT

Income Tax

No. 3435

JOHN D. MORRIS,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF REVENUE,)
State of Oregon,)
)
Defendant.)

OPINION

Plaintiff appeals an assessment of income taxes for 1985 on the grounds that he was not a resident and earned no income in Oregon.

Plaintiff was born and raised in Arkansas. In 1956 he entered the United States Navy. In 1966 he married a native Oregonian and, upon his release from the Navy in 1970, moved his family to Oregon. In 1981 plaintiff's wife divorced him. Plaintiff went to Arkansas briefly, then to Idaho. During the period from 1982 to 1984 plaintiff remarried and lived and worked in Idaho. In November 1984 plaintiff again divorced and returned to Oregon.

Plaintiff was in Oregon from November 1984 to March 1985 living with a friend and looking for work. He testified that he obtained a temporary appointment with the Bonneville Power Administration (BPA) and moved to Vancouver, Washington, his "duty station." Plaintiff worked in Montana and other parts of Washington while employed by BPA. However, he continued his contacts with Oregon, including obtaining an Oregon driver's license and maintaining an Oregon bank account. Plaintiff's appointment with BPA expired in October 1985 whereupon he moved to Portland and rented an apartment. Plaintiff drew unemployment benefits from Washington state from October 1985 until August 1986.

Plaintiff filed a federal income tax return for 1985 showing an Oregon address but did not file an Oregon income tax return. Plaintiff testified that he moved to Portland to file a complaint against BPA for refusing to hire him on a permanent basis.

In August 1986 plaintiff left Oregon to travel and work in Washington. He returned to Oregon in November 1987 where he remained until March 1988 when he moved to Arkansas. While in Arkansas plaintiff married for the third time. He remained in Arkansas until April 1990 when he returned to Oregon. He currently resides in Oregon.

Plaintiff's primary arguments against his being domiciled[1]

---

[1] ORS 316.027(1) provides:

"(1) 'Resident' or 'resident of

in Oregon during 1985 are: (1) He came to visit a friend after his divorce; and (2) he is unable to practice his trade as an electrician in Oregon.

Domicile occurs when an individual establishes an abode and intends to remain there permanently or indefinitely. Reed's Will, 48 Or 500, 87 P 763 (1906). To change one's domicile, a person must: (a) establish a residence in another place; (b) intend to abandon the old domicile; and (3) intend to acquire a new domicile. Elwert v. Elwert, 196 Or 256, 248 P2d 847 (1952).

Based on the evidence, the court finds that plaintiff was domiciled in Oregon during 1985. Although plaintiff contends he

---

this state' means:

"(a) An individual who is domiciled in this state unless he (A) maintains no permanent place of abode in this state, and (B) does not maintain a permanent place of abode elsewhere, and (C) spends in the aggregate not more than 30 days in the taxable year in this state; or

"(b) An individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than 200 days of the taxable year in this state is presumed to be a resident unless the individual proves that the individual is in the state only for a temporary or transitory purpose.

"(2) for purposes of paragraph (b) of subsection (1) of this section, a fraction of a calendar day shall be counted as a whole day."

was just visiting in Oregon, he established an abode here, obtained a driver's license and opened a bank account. He attempted to obtain an Oregon electrician's license and in general acted as if Oregon where his residence. These facts indicate an intent to abandon his domicile in Idaho and establish a domicile in Oregon.

The court further finds that plaintiff did not abandon his Oregon domicile until after 1985. During the period that plaintiff worked for the BPA in Washington and Montana, he continued to maintain his ties with Oregon. Until he moved to Arkansas, he returned to Oregon after temporary absences and maintained the type of contacts with Oregon which evidence an intent to remain domiciled in Oregon.

Based on the above findings, defendant's Opinion and Order No. 91-0940 must be sustained. Costs to neither party.

Dated this 9th day of March, 1994.

/s/ Carl Byers

Judge

APPENDIX C

STATE OF OREGON

DEPARTMENT OF REVENUE

In the Matter of the Appeal	)	
	)	
of	)	OPINION AND ORDER
	)	
John D. Morris from an Act of the State of Oregon Concerning Certain Personal Income Tax Matters for Tax Year 1985	)	No. 91-0940

The petitioner has appealed a Notice of Determination and Assessment issued July 12, 1989, by the Department of Revenue for failure to file a personal income tax return for tax year 1985.

At issue is whether an appeal was filed within the period provided under ORS 305.280 to establish jurisdiction for the department to hear the merits of the case.

A telephone hearing was held January 22, 1992, at 2 p.m. before Glen E. Pfefferkorn, Hearings Officer. Participating in the hearing were John Morris, the petitioner; and Bruce Hale, an auditor representing the Department of Revenue Audit Division.

John Morris testified he grew up in Arkansas. From 1970 until

1981 he lived in a house he owned in Oregon. In 1981 he and his wife divorced. His former wife was awarded the house and $1,500 per month alimony payments. Homeless and without resources to pay alimony, he moved to Washington as a disenfranchised Oregon citizen.

In early 1982 he went to Arkansas. About mid-year he moved to Idaho. He remarried and lived there until late 1984. He had an Idaho driver's license and filed Idaho tax returns. During January and February 1985, he lived with a former neighbor in St. Helens, Oregon. From March to October of that year he worked for Bonneville Power, construction branch, headquartered in Vancouver, Washington. His job locations were Missoula, Montana and Sheldon, Washington.

In October he returned to Oregon and rented an apartment in Portland. He was unemployed and drew unemployment insurance from Washington. He remained in Oregon until August 1986. During that time he filed his 1985 federal tax return using an Oregon address.

In August 1986 he left for an around-the-world trip. Upon his return he lived in Nevada during early 1987. From June to November of that year he worked in Wenatchee, Washington, again

for Bonneville Power Administration.

In November 1987 he returned to Oregon and rented a trailer in St. Helens, Oregon. He remained until March 1988, when he left for Arkansas. He stayed there until April 1991, when he returned to Oregon. Mr. Morris was last registered to vote in 1980. He was not a union member during the year at issue. He belongs to only one organization, Idaho Elks. In 1985 he attempted to renew his Oregon electrician's license but was unsuccessful.

Bruce Hale testified that the department's assessment was based on information from the Internal Revenue Service that the petitioner had filed an 1985 federal tax return from an Oregon address. He also determined from Division of Motor Vehicle records that the petitioner obtained an Oregon driver's license on June 3, 1985. The Notice of Determination and Assessment mailed to the petitioner's address at PO Box 1318, St. Helens, Oregon, was returned unclaimed. He asserts the petitioner was an Oregon resident during 1985.

OPINION OF THE DEPARTMENT

The Notice of Assessment issued by the department was dated July 12, 1989. Under ORS 305.280(2) the petitioner had 90 days to file

an appeal. His appeal was not received until April 24, 1991. There is no question the appeal was beyond the period provided by statute. However, under ORS 305.295 we must determine whether the department assessed tax to an individual who is not within its jurisdiction to tax. We must determine whether Mr. Morris was a domicile of Oregon during 1985.

In Elwert v. Elwert, 196 OR 256, 264-205 (1952), the court said:

> No single word in the legal vocabulary is more difficult than "domicil" to define accurately.

In Reed's Will, supra, at 504, this court said:

> Domicile, strictly speaking, is a relation the law creates between an individual and a particular place or country, and each case is dependent upon its particular facts. It is not in a legal sense synonymous with residence. . . .To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place, and an intention to remain there permanently or indefinitely; . . . .Domicile, therefore, is made up of residence and intention. Neither, standing

> alone, is sufficient for the purpose. Residence is not enough, except as it is cojoined with intent which determines whether its character is permanent or temporary, and clearly a mere intent cannot create a domicile. . . .

Again, in Elwert, 196 OR at 265, the court said:

> A person does not acquire a new domicil by merely going to another place with intent of making it his domicil. More is required in the eyes of the law. Such intention must be supported with an intention (1) of residing in a new place for a more or less indefinite time, and (2) of making the new place his home within the meaning "home" as that term is used in the law of domicil. 17 Am Jur, Domicil 604, §23. In Restatement, Conflict of Laws, 39, §20, we find: "For the acquisition of a domicil of choice, the intention to make a home must be an intention to make a home at the moment, not to make a home in the future."

Mr. Morris testified that when he left Oregon in 1981, he intended

to leave permanently. He had lost his home in a divorce. He was ordered to pay $1,500.00 per month alimony, and he had no stable income source to make such payments. He felt he had no choice but to leave the state. It was four years later in early 1985 that he returned to Oregon. During his absence he lived in Idaho, filed tax returns with that state, had an Idaho driver's license, and resided there with his new wife. The roots established there indicate he changed his domicile from Oregon.

The question then is whether the time spent living with his former neighbor in January and February 1985, and living in Oregon after October 1985 when he rented an apartment in Portland, changed his domicile back to Oregon. During the time he resided here that year, he was unemployed. He did open a bank account to conduct business. His employment, when available, was with Bonneville Power Administration, construction branch, headquartered in Vancouver, Washington. He testified he returned to be near his former neighbors and friends. After his marriage ended in Idaho in late 1984, he had more transitory roots. However each time he left Oregon he returned. This action shows he considered Oregon home.

Based on these facts, the department is persuaded that Mr. Morris was an Oregon domicile during 1985. Therefore he must appeal

within the time limits of ORS 305.280(2). Stokes v. Dept of Rev. 10 OTR 56 (1988). Since he did not appeal within 90 days, the appeal must be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

The amount now due and owing is:

Tax Year	Tax	50% Penalty	Warrant Fee	Interest	Balance
1985	$2,035	$1,017.50	$10.00	$1,801.18	$4,863.68

APPENDIX D

STATE OF OREGON

DEPARTMENT OF REVENUE

In the Matter of the Appeal of John D. Morris from an Act of the State of Oregon Concerning Certain Personal Income Tax Matters for Tax Year 1985.	))))))))	OPINION AND ORDER No. 91-0940

[Draft Opinion and Order in favor of John D. Morris as prepared by Hearings Officer Pfefferkorn prior to its being changed by the chief, hearings officer who did not participate at the hearing]

(Last page) (No other changes made to Opinion and Order)
The question then is whether the time spent living with his former neighbor in January and February 1985, and living in Oregon after October 1985 when he rented an apartment in Portland, changed his domicile back to Oregon. During the time he resided here that year, he was unemployed. He did open a bank account to conduct business. His employment, when available, was with Bonneville Power Administration, construction branch headquartered in Vancouver, Washington. He tried to renew his Oregon electrician's license so he could work in Oregon. He was unable to renew that

license.

Based on these facts, the department is persuaded that Mr. Morris was not an Oregon domicile during 1985, during the time he earned income. If renting an apartment in Portland re-establishes Oregon domicile, that occurred in October 1985, and he was unemployed from then until the end of the year. The department cannot emphasize too strongly that an individual who chooses to ignore correspondence from the Audit Division does so at his or her peril. In failing to appeal within 90 days of the assessment, Mr. Morris came as close as anyone can to having his appeal dismissed. Nonetheless, the department is of the opinion that the relationship between the facts of this case and ORS 305.265(15) and 305.295(1)(a) is s